BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUSSELL FOLSOM Claimant	)	
VS.	)	
MIDWEST GRAIN PRODUCTS, INC. Respondent	)	Docket No. 241,685
AND	)	
AMERICAN INTERNATIONAL SOUTH Insurance Carrier	)	

ORDER

Claimant requested review of the August 14, 2006 Post Award Medical Award by Administrative Law Judge (ALJ) Bryce Benedict.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award for Post Awa
rd Medical.

ISSUES

The ALJ granted claimant's request, post award, for ongoing expenses associated with his glucosamine/cosamine prescriptions. However, the ALJ denied claimant's request for the costs associated with his use of Vioxx, Bextra, and Celebrex reasoning that no physician opined that those medications were prescribed to treat the effects of the claimant's 1998 work accident.[1]

[1] ALJ Award (Aug. 14, 2006) at 2.

The claimant requests review of this decision alleging the ALJ "ignored" uncontroverted evidence and should have granted the request for all of his ongoing prescription medications as well as his claim for attorney's fees.

Respondent argues the ALJ's decision, post award, should be affirmed in all respects. At the hearing respondent contended that in 2004 claimant moved on to work elsewhere for at least 2 other employers and that as of April 2006, it no longer believed claimant's need for anti-inflammatories was causally connected to his 1998 accident.

The issues to be addressed in this appeal are as follows:

1. Whether claimant is entitled to reimbursement and ongoing payment of certain prescription expenses; and
2. Claimant's entitlement to post award attorney's fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant filed a post award request for payment of prescriptions and mileage totaling a sum of $635.68. At the hearing, respondent advised that $379.20 of the itemized expenses were not in dispute and would be paid. Moreover, any prescriptions for glucosomine made by Dr. Shriwise are not in dispute. But that the balance, $256.48, incurred after April 7, 2006, for anti-inflammatory drugs, remains in dispute. Claimant maintains the prescriptions were issued by Dr. Shriwise, the treating physician, and as such, the prescriptions are properly due.

Respondent argues that claimant has failed to show that the anti-inflammatories prescribed by Dr. Shriwise are necessary to cure and relieve claimant of the effects of his 1998 injury, which is the focus of this claim, rather than the subsequent work activities he performed after leaving respondent's employ in 2004. And absent such a showing, claimant is entitled only to reimbursement for the glucosomine prescription expenses as prescribed by Dr. Shriwise.

The ALJ correctly noted the chronological history in this matter. Claimant settled his claim but his right to future medical benefits for his right knee injury remained available to him. Since settling, he has required ongoing prescription medications, including a prescription for glucosamine or cosamine. Dr. Shriwise was the treating physician in this claim and he continued to provide that prescription to claimant as needed, up to April 2006.

In January 2004, claimant left respondent's employ. According to claimant, he was required to continually climb flights of stairs and that activity was causing him significant

pain complaints to his knee. Thus, he elected to find other employment. Immediately thereafter, claimant began working for a construction company, pouring concrete and finishing it off. This job required claimant to work 4 - 10 hour days.

After working construction for about 7 months claimant sought treatment from his own private physician and expressed an increase in right knee complaints. Up until this point, claimant was taking over the counter medications to manage his pain. His physician prescribed Vioxx, an anti-inflammatory drug. Later, when claimant was able to get in to see Dr. Shriwise, he too prescribed Vioxx. Eventually this prescription was revised to account for the unavailability of Vioxx. Dr. Shriwise prescribed Bextra and later Celebrex, both anti-inflammatories.

Claimant worked the construction job for approximately 8 months total and when they could not provide him with a job that would allow him to stay seated, he quit. After 2 months of unemployment, he found a job working at a bottling plant, beginning in August 2005. This job requires him to stand at his position for an 8 hour shift.

At some point claimant submitted his request for reimbursement for the Vioxx, Bextra and Celebrex prescriptions and for authorization to continue providing those prescriptions. As of April 7, 2006 respondent indicated it was no longer willing to provide the anti-inflammatory prescription as it was unpersuaded that claimant's need was causally related to his 1998 accident.

The ALJ considered the claimant's testimony as well as that of Dr. Zimmerman, a physician who testified at on claimant's behalf at the Regular Hearing back in 2000, and made the following conclusions:

> Neither party has presented an expert medical opinion regarding whether the Vioxx/Bextra/Celebrex was prescribed to treat the effects of the 1998 work accident, or the effects of working construction.
>
> The Court finds that it is more likely than not that the prescription of the Vioxx/Bextra/Celebrex was necessitated by an aggravation of his preexisting condition, and that the aggravation was the result of his employment in the construction industry.[2]

Accordingly, the ALJ denied claimant's request for reimbursement of the anti-inflammatory drugs. He then went on to find that respondent was responsible for the past and future prescription expenses associated with glucosamine or cosamine, as that drug had been prescribed by Dr. Shriwise since 1999.

---

[2] *Id.* at 2.

Claimant suggests that Dr. Zimmerman's testimony provides ample medical support for his contention that the anti-inflammatories he has now, over 8 years post-injury, been prescribed are necessary to cure and relieve claimant of his work-related pain complaints. The Board is unpersuaded. Dr. Zimmerman certainly testified that the medications claimant was taking *at the time of his 2000 deposition* were medically necessary. But as of the time of that deposition, claimant was taking over the counter medications and had not yet been prescribed Vioxx or any of the other related medications. The better evidence would have come from Dr. Shriwise, who took it upon himself to begin prescribing the anti-inflammatories. But Dr. Shriwise did not testify.

Instead, claimant filed a reply brief and contends that Dr. Shriwise has opined that claimant's need for Vioxx is "partly due to his old work-related injury". This opinion was contained within an office note and noted above, was not supported by deposition testimony. Although the document was admitted into evidence, it was only conditionally admitted for the purpose of establishing the nature of claimant's complaints to Dr. Shriwise as of the appointment, September 7, 2004. The transcript of the hearing makes this clear. Respondent objected to the admission of the document based upon K.S.A. 44-519.[3] And that objection was sustained but later overruled *based upon the express understanding that Dr. Shriwise's report was admissible only for the purpose of establishing the date and time of claimant's complaints.*[4] Absent deposition testimony from Dr. Shriwise, his causal opinions are inadmissible.[5] Thus, the ALJ is correct, there is no medical testimony that indicates the disputed medications are necessary to treat the effects of the 1998 work accident.

Moreover, the timing of the prescription was what undoubtedly led the ALJ to reject claimant's request. Claimant was working at a construction company, on his feet all day, a duty that he admits causes him additional pain. His pain increased enough such that he sought additional medical treatment. While claimant himself may attribute all this to his original 1998 injury, the fact that he was involved in construction duties, so harsh on his body that he ultimately quit, certainly supports the ALJ's conclusion that he aggravated his pre-existing knee condition, thereby necessitating the need for more aggressive medications. The Board disagrees with the claimant's contention that the ALJ "ignored" the fact that there was no aggravation or new injury. It is true that claimant asserted no new workers compensation claim against the construction company but that alone does not mean there was no aggravation or new injury. Based upon a totality of the testimony and evidence, the Board finds the ALJ's Post Award Medical Award should be affirmed.

---

[3] P.A.H. Trans. (June 1, 2006) at 18.

[4] *Id.* at 30-31.

[5] K.S.A. 44-519.

As for the claimant's request for attorney's fees, this issue will not be addressed by the Board. The Order indicates that if the parties cannot agree upon a fee for claimant's counsel's services, a second hearing shall be scheduled. Obviously then, the ALJ has not yet had an opportunity to address this issue and the Board will not consider matters which have not been presented to the ALJ.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Medical Award of Administrative Law Judge Bryce Benedict dated August 14, 2006, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of October, 2006.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Bryce Benedict, Administrative Law Judge